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1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3

4 UNITED STATES OF AMERICA,

5 Government,

6 vs. CR No. 10-CR-2734 JCH

7 JOHN CHARLES McCLUSKEY,

8 Defendant.

9

10 TRANSCRIPT OF PROCEEDINGS

11 VOLUME 65

12 TRIAL ON THE MERITS

13 PUNISHMENT PHASE

14 SELECTION PHASE

15 DECEMBER 11, 2013

16

17 BEFORE: HONORABLE JUDGE JUDITH HERRERA
UNITED STATES DISTRICT JUDGE

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22 Proceedings reported by stenotype.

23 Transcript produced by computer-aided
24 transcription.

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PAUL BACA, OFFICIAL COURT REPORTER

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1 A P P E A R A N C E S:

2 FOR THE GOVERNMENT: LINDA J. MOTT
3 linda.j.mott@usdoj.gov
4 GREGORY J. FOURATT
5 greg.fouratt@usdoj.gov
6 MIKE WARBEL
7 Assistant United States Attorneys
8 P.O. Box 607
9 Albuquerque, New Mexico 87102
10 505-346-7274

11 FOR THE DEFENDANT: THERESA M. DUNCAN
12 teri@duncanearnest.com
13 Duncan Earnest Law
14 600 Central Avenue, Southeast
15 Suite 204
16 Albuquerque, New Mexico 87102
17 505-842-5196

18 GARY C. MITCHELL
19 gmitchell@zianet.com
20 Law Offices of Gary C. Mitchell,
21 LLC
22 443 Mechem Dr.
23 P.O. Box 2460
24 Ruidoso, New Mexico 88355-2460
25 575-257-3070

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1 (Open court; outside the presence of the
2 jury.)

3 THE COURT: Please be seated.

4 We're on the record in USA versus
5 McCluskey, 10-CR-2734.

6 I note that all counsel are present.

7 The defendant is present.

8 I guess Mr. Burt had a conflict, so he's
9 not here at the moment.

10 Before we bring the jury in, let me see
11 counsel at the bench, please.

12 (Bench discussion:)

13 THE COURT: So just a couple of things. I
14 wanted to make sure that there was no -- we were off
15 the record in putting our responses to the jurors'
16 questions together, so I wanted to make sure that you
17 have a chance on the record to make any comments that
18 you would like to make about responses that were sent
19 back to the jury.

20 MS. MOTT: No comments.

21 MS. DUNCAN: The defense has no comments,
22 Your Honor.

23 THE COURT: And then there was a note that
24 we received from the jury almost right out of the
25 chute that just said that an exhibit wasn't playing

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1 properly. And so I didn't give that to you at the
2 time because it really didn't deal with
3 deliberations; it was more of a technical problem.

4 And so the -- another machine was sent into
5 the jury room and they were able to play it, and so
6 that's how we resolved it.

7 So is that okay with everybody?

8 MS. MOTT: That's fine.

9 MS. DUNCAN: Yes.

10 THE COURT: I have one other thing.

11 MR. FOURATT: I have one other thing.

12 THE COURT: All right. Next is, where
13 should I begin reading this verdict form?

14 Now assuming it comes out as we expect it
15 to, I know you had suggested beginning with the
16 weighing process. I'm not sure that is necessary.

17 MS. MOTT: I don't think that's necessary
18 at this point. I don't think it is.

19 MR. MITCHELL: May I make a suggestion,
20 Your Honor?

21 That when you receive the verdict forms --

22 THE COURT: Yes.

23 MR. MITCHELL: -- that you take a look at
24 them.

25 THE COURT: Yes.

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1 MR. MITCHELL: And that you -- if it is, as
2 we expect, that they couldn't reach a unanimous
3 verdict either way, that the Court simply look at the
4 verdict forms without announcing the vote or anything
5 else and say, I note that the jury was unable to
6 reach a unanimous decision. I note that, by my count
7 here, that that verifies that you were not able to
8 reach a unanimous decision.

9 Is that correct?

10 The answer is Yes.

11 Or you don't need to say, Is that correct.

12 And by that, pursuant to the law, these are
13 life. The Court then --

14 THE COURT: Well, I'm not -- I'm not
15 sentencing today.

16 MR. MITCHELL: No, I'm not saying that.

17 It's pursuant to the law. The Court -- the law then
18 mandates what the Court must do with a nonunanimous
19 verdict, something like that. That's all I'm
20 suggesting.

21 MR. FOURATT: Well, the last part of that
22 is superfluous and unnecessary.

23 Once the Court -- once the Court confirms
24 that it's not unanimous, then the Court can simply
25 discharge the jury and recess for the day.

1 MR. MITCHELL: That's fine.

2 THE COURT: Just so that I don't have to
3 call you back up here.

4 MR. FOURATT: I was going to suggest that
5 you do call us back when you get the findings form,
6 if you need any input from the parties. If you
7 don't, obviously, we know what was said.

8 THE COURT: Well, I suppose something could
9 come up where I would need your input. But if it's
10 as we think it might be, I just wanted to have it
11 understood before we --

12 MR. WARBEL: I think they're going to
13 answer I-C no, because the question asks them, Are
14 you unanimous, yes or no?

15 And they'll say no.

16 THE COURT: Well, I'll look at it. But --
17 so what I'll do, then, is I'll look at it. And if
18 there is anything answered on page 25 or page 26 I
19 will read those answers.

20 Now, if there -- if it's blank, then I
21 think I will just proceed as we -- as was mentioned a
22 moment ago, to simply say on the record that the jury
23 was unable to reach a unanimous verdict and your work
24 is done.

25 MS. DUNCAN: Right. That's fine with us,

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1 Your Honor.

2 MS. MOTT: Thank you, Your Honor.

3 MR. FOURATT: And then we'll talk about a
4 scheduling of the sentencing hearing at another time.

5 THE COURT: Correct. Now --

6 MS. DUNCAN: We just have another question.

7 In terms of talking to the jurors, I've
8 never appeared in trial before Your Honor, and I
9 don't know what your process is.

10 THE COURT: I will instruct them that they
11 are discharged and they are free to talk to you all
12 if they choose to do so. And if they don't want to
13 they don't have to. I'll give them that information.

14 I will tell you that I plan on inviting
15 them up to my chambers after we're done here, so no
16 point in waiting for them in the hallway.

17 MS. MOTT: They won't be hanging out for
18 us. Okay.

19 MR. WARBEL: What we did in Judge Brack's
20 courtroom --

21 THE COURT: Uh-huh.

22 MR. WARBEL: -- and I don't know if you're
23 inclined to do this or not. But he asked the jurors,
24 If you would like the -- the prosecutors -- the
25 attorneys would like to speak with you. If you would

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1 like to remain and speak with them you may, and he
2 provided the jury room, and the defense got a chance
3 to talk and the prosecution got a chance to talk.

4 Are you guys interested in that?

5 MS. DUNCAN: Yes.

6 THE COURT: But I'm going to take them up
7 first.

8 MR. WARBEL: Sure. That's what Judge Brack
9 did.

10 THE COURT: Okay.

11 MS. MOTT: You go first, Your Honor. And
12 if they want to come back down...

13 MR. WARBEL: Well, I'm willing to stay. If
14 they're willing to stay and stick around, we would
15 like to talk to them.

16 THE COURT: All right.

17 MR. WARBEL: Thanks, Judge.

18 MS. DUNCAN: Thank you.

19 (End of bench conference.)

20 THE COURT: We are ready for the jury.

21 (Open court; jury present.)

22 THE COURT: Please be seated.

23 Good afternoon, ladies and gentlemen of the
24 jury.

25 I understand you have reached a decision.

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1 FOREPERSON: Yes, ma'am.

2 THE COURT: If you would, please hand the
3 envelope to the court security officer.

4 All right. The verdict appears to be in
5 order. This is a long verdict form, and I am not
6 going to read the first 24 pages.

7 I will begin at page 25.

8 Now page 25 begins the weighing process,
9 and I will -- I will note for the record that each
10 question on page 25 and page 26 was answered no.

11 So the introductory paragraphs informed the
12 jury that the question they must answer at this stage
13 of their deliberations is whether the proven
14 aggravating factors sufficiently outweigh the proven
15 mitigating factors to justify a sentence of death.

16 Each -- each was answered no.

17 So that's a summary version of page 25 and
18 page 26.

19 The verdict -- the jury was unable to reach
20 a unanimous verdict, and so the -- I'll turn then to
21 the certification, page 30.

22 The certification asked the jury to -- to
23 sign and indicate and certify that consideration of
24 the race, color, religious beliefs, national origin
25 or gender of the defendant or the victim was not

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1 involved in reaching his or her individual decision,
2 and the individual juror would have made the same
3 decision regarding the appropriate sentence
4 regardless of the race, color, religious beliefs,
5 national origin or gender of the defendant or the
6 victims.

7 And that is properly signed by each member
8 of the jury.

9 So the jury, having been unable to reach a
10 unanimous decision in this case, has now completed
11 its work.

12 And so with this, ladies and gentlemen of
13 the jury, I want to thank you for your work. We've
14 been here for a long time, months. And you have been
15 very attentive. You have given this case serious
16 consideration. We ended closing arguments last
17 Wednesday. You began deliberating last Thursday.

18 You deliberated all day Thursday and
19 reconvened this week on Monday and -- and finished
20 your work out today, Wednesday, and you've been a
21 very hardworking jury.

22 And so I want you all to know that we
23 appreciate your work, and I'm going to discharge you
24 at this time.

25 Now, I have told you throughout the course

1 of this trial that you couldn't talk to anybody about
2 this case. That no longer applies.

3 You're free to talk to whomever you wish.

4 You're free to tell people whatever you want to say
5 about this trial, but you are also free not to talk
6 to anyone if that's your desire.

7 I will tell you that the attorneys would
8 love to talk to you, if you are interested in talking
9 to them.

10 What I would like to do is invite all of
11 you up to the -- to my office and visit with you for
12 a while. It's not mandatory, but if you have time to
13 do that, I would like to thank you in a less formal
14 setting.

15 After we're done up in my chambers, if any
16 of you are willing or interested in talking to the
17 attorneys, I have invited them to go to the jury
18 room. If any of you would like to go back to the
19 jury room and talk to the attorneys, I would expect
20 that attorneys from both sides -- at least some
21 attorneys from both sides -- will be there to talk to
22 you.

23 And as I said, you're free to say anything
24 to them that you'd like.

25 And you're free to look at any news

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1 reports, anything you want to do.

2 You are done with all of the restrictions
3 that I previously imposed on you.

4 So let me ask counsel, is there anything
5 further before I excuse the jury?

6 MR. FOURATT: No, ma'am.

7 MS. DUNCAN: No, ma'am.

8 THE COURT: All right.

9 So, ladies and gentlemen, again, thank you.
10 And you are discharged, and I will ask that you
11 follow Irene. She'll get you upstairs.

12 (Jury discharged; open court.

13 THE COURT: Is there anything further?

14 MR. FOURATT: No, Your Honor.

15 MS. DUNCAN: No, Your Honor.

16 THE COURT: All right.

17 We'll be in recess.

18 (Evening recess.)

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1 CERTIFICATION

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3 I certify that the foregoing is a correct
4 transcript from the record of proceedings in the
5 above-entitled matter. I further certify that the
6 transcript fees and format comply with those
7 prescribed by the Court and the Judicial Conference
8 of the United States.

9

10 Date: December 11, 2013

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1 I N D E X

2 GOVERNMENT'S EVIDENCE

3 DEFENSE EVIDENCE

4 WITNESSES:

5 Verdict 13057

6 Jury Discharged 13060

7 Certificate of Court Reporter 13061

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